STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2005
V	No. 253449 Kalkaska Circuit Court
EUGENE EDWARD ABRAMCZYK, Defendant-Appellant.	LC No. 03-002323-FH

Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of three counts of delivery of 50 grams or more but less than 225 grams of a controlled substance (morphine). See former MCL 333.7401(2)(a)(iii).[1] The trial court sentenced defendant to three consecutive terms of 10 to 40 years' imprisonment. We affirm.

Defendant first argues that the prosecution failed to prove an essential element of the crimes, specifically, that the morphine he delivered was a schedule 2 substance under MCL 333.7214(a)(i) rather than a schedule 3 substance under MCL 333.7216(1)(g)(viii). Essentially, this issue is one of statutory interpretation. We review issues of statutory interpretation de novo. *People v Stewart*, 472 Mich 624, 631; 698 NW2d 340 (2005).

The version of MCL 333.7401 applicable to defendant's situation stated, in part:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

[1] In its current version, MCL 333.7401(2)(a)(iii) applies to amounts of 50 grams or more but less than 450 grams of a controlled substance.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

* * *

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony . . . .

MCL 333.7401(2)(b)(ii) indicates (and indicated at the time applicable to defendant's situation) that a person violating the section with regard to "[a]ny other controlled substance classified in schedule 1, 2, or 3, except marihuana[,] is guilty of a felony . . . ." MCL 333.7401(2)(a)(iii) provides for a harsher penalty than MCL 333.7401(2)(b)(ii). In fact, at the time applicable to defendant's situation, MCL 333.7401(2)(a)(iii) mandated imprisonment of "not less than 10 years" for a violation of the statute.[2]

MCL 333.7214 states, in part:

The following controlled substances are included in schedule 2:

(a) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i) . . . Morphine[.]

MCL 333.7216 states, in part:

(1) The following controlled substances are included in schedule 3:

* * *

(g) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs or their salts:

* * *

(viii) Not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams, with 1 or more active nonnarcotic ingredients in recognized therapeutic amounts.

[2] The current version of MCL 333.7401(2)(a)(iii) does not provide for a mandatory minimum sentence.

Defendant contends that if MCL 333.7214(a)(i) and MCL 333.7216(1)(g)(viii) are read together, it becomes apparent that, in this case, the prosecutor was required to prove that the morphine defendant delivered contained more than fifty milligrams of morphine per one hundred milliliters or grams of a nonnarcotic substance and thus was classified as a schedule 2 drug rather than a schedule 3 drug. He contends that MCL 333.7401(2)(b)(ii) rather than MCL 333.7401(2)(a)(iii) might have applied to his circumstances and that a new trial is therefore required. We disagree.

As noted above, MCL 333.7401(2)(a) indicates that it applies to a schedule 2 controlled substance. Morphine is classified as a schedule 2 substance under MCL 333.7214(a)(i) and further indicates that "those narcotic drugs listed in other schedules" are not included in schedule 2. However, the exception for "those narcotic drugs listed in other schedules" is something that must be raised by the defendant before it can come into play at trial. See, generally, *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994),[3] and *People v Henderson*, 391 Mich 612; 218 NW2d 2 (1974).

In *Pegenau*, the Michigan Supreme Court determined that the elements of the crime of possession of a controlled substance under MCL 333.7403(1) amounted to the operative words "'[a] person shall not knowingly or intentionally possess a controlled substance . . . .'" *Pegenau, supra* at 292, quoting MCL 333.7403(1). The Court concluded that additional statutory language providing that a valid prescription would justify the possession of a controlled substance did not constitute an element of the crime but merely created an exemption that placed the burden of production on the defendant regarding his possession of a valid prescription. *Pegenau, supra* at 292-293.

The *Pegenau* Court relied on MCL 333.7531, which states:

> (1) It is not necessary for this state to negate any exemption or exception in this article in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under this article. The burden of proof[4] of an exemption or exception is upon the person claiming it.
>
> (2) In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under this article, the person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut the presumption.
>
> (3) A liability is not imposed by this article or [sic] an authorized state, county, or local officer, engaged in the lawful performance of the officer's duties.

[3] We note that *Pegenau* was a plurality opinion but that a majority of the justices agreed with the holdings in *Pegenau* that are applicable to the instant case.

[4] *Pegenau* did not reach the issue of the burden of *proof* but limited its analysis to whether the defendant bore the burden of *production*. See *Pegenau, supra* at 292 n 13.

The *Pegenau* analysis is applicable to this case. Defendant did not meet his burden of production to show that the morphine in question might have been a schedule 3 controlled substance.

In *Henderson, supra* at 616, the Michigan Supreme Court held that a defendant charged with possessing a concealed weapon under the former version of MCL 750.227 "has the burden of injecting the issue of license by offering some proof – not necessarily by official record – that he has been so licensed. The people thereupon are obliged to establish the contrary beyond a reasonable doubt." The *Henderson* Court made this holding even though the statute contained (and still contains) language indicating that a license can justify the possession of a concealed weapon. Similarly, in this case defendant was obliged to "inject[] the issue" regarding the schedule 3 requirements into trial, and he did not do so. *Henderson, supra* at 616.

In light of *Pegenau* and *Henderson*, defendant's argument that the prosecutor failed to establish an element of the crimes is without merit. Reversal is unwarranted.

Defendant next argues that manifest injustice occurred because the trial court did not instruct the jury regarding whether defendant possessed a schedule 2 or schedule 3 substance. Given our above analysis, this argument is without merit. Defendant did not meet his burden of production concerning the schedule 3 issue, and therefore the jury need not and should not have been instructed with regard to schedule 3 controlled substances. Moreover, defendant's attorney acceded to the jury instructions without objection, despite being offered the opportunity to make any further changes to the instructions. Accordingly, any error was extinguished. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant additionally argues that his counsel's failure to raise the schedule 3 issue amounted to ineffective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To prove ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* The defendant must also demonstrate a reasonable probability that his attorney's error or errors affected the outcome of the trial. *Id.* at 663-664. Defendant has not met his appellate burden. Indeed, there is no evidence that the morphine he delivered did, in actuality, fall under a schedule 3 classification. Accordingly, we cannot conclude that the attorney's failure to raise the issue affected the outcome of the trial. In addition, the attorney was not ineffective for failing to request a jury instruction regarding the schedule 3 issue, considering that defendant did not meet his burden of production in the lower court with regard to that issue. Reversal is not warranted.

Defendant next argues that his conviction should be reversed because the trial court erred in finding that the police did not entrap defendant. This Court reviews a trial court's finding regarding entrapment for clear error. *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002). Clear error exists when this Court "is left with a definite and firm conviction that a mistake has been made." *Id*. at 497-498.

The police entrap a defendant if they either: (1) engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime under analogous circumstances

or (2) "engage[] in conduct so reprehensible that it cannot be tolerated." *Id.* at 498. If the police merely present a defendant with an opportunity to commit a crime, however, entrapment does not occur. *Id*. A reviewing court should consider the twelve following factors when examining police activity in relation to the issue of entrapment:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Id*. at 498-499.]

Looking at the evidence presented by the parties in light of these factors, the trial court did not clearly err by finding that defendant was not entrapped. While the informant and defendant were friends and had used drugs together in the past, defendant never refused to deliver the morphine and it took no excessive prodding on the informant's part to get defendant to deliver it. With the exception of several initial conversations between the informant and defendant, the informant's actions during and after the drug buys were closely monitored by police personnel and tape recorders. No evidence was presented to suggest that any of the remaining factors would favor defendant. The trial court did not commit clear error when it found that defendant was not entrapped.

Lastly, defendant argues that the trial court acted improperly by failing to sentence him under amendments to the drug sentencing laws. This issue involves statutory interpretation, which we review de novo. *Stewart*, *supra* at 631.

MCL 333.7401(2)(a)(iii) provides for a punishment of "imprisonment for not more than 20 years or a fine of not more that $250,000.00, or both." However, the prior version of MCL 333.7401(2)(a)(iii), in addition to pertaining to drug amounts of "50 grams or more but less than 225 grams," provided for a punishment of imprisonment "for not less than 10 years nor more than 20 years." The new version of MCL 333.7401(2)(a)(iii) took effect on March 1, 2003.

Defendant committed his offenses in July 2002. Accordingly, he was not eligible for the reduced sentence provided in the updated version of MCL 333.7401(2)(a)(iii). See *People v Doxey*, 263 Mich App 115, 122-123; 687 NW2d 360 (2004) (the statute is "applied prospectively only and only to offenses committed on or after . . . March 1, 2003").

In *People v Thomas*, 260 Mich App 450, 459; 678 NW2d 631 (2004), the Court, in discussing the amendment to MCL 333.7401(2)(a)(iii), stated:

> Additionally, we note that the plain language of MCL 791.234 specifically

> provides that individuals *previously convicted* under MCL 333.7401(2)(a)(iii) may become eligible for parole "after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less."
>
> It appears plain that the Legislature has specifically provided relief – in the form of early parole eligibility – for individuals, such as defendant, who were convicted and sentenced before the amendatory act became effective. Because the Legislature declined to specifically apply the amended sentencing provisions of MCL 333.7401(2)(a)(iii) retroactively and instead specifically provided early parole eligibility to such defendants, we decline defendant's invitation to ignore the plain language of the statute.

MCL 791.234(12) states that

> [a]n individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) or 7403(2)(a)(iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, before March 1, 2003 is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less.

Defendant points out that the Department of Corrections has interpreted MCL 791.234 as applying only to those individuals who were convicted before March 1, 2003. Accordingly, defendant argues that he is caught in a sort of "gap," because his conviction did not occur until November 25, 2003. In other words, he argues that an unfairness would result if he cannot take advantage of the new version of MCL 333.7401(2)(a)(iii) (because the crimes occurred before March 1, 2003) and also cannot make use of MCL 791.234(12) (because he was sentenced after March 1, 2003).

We agree that defendant is caught in a sort of "gap." However, we are bound to follow the holding of *Doxey*, *supra* at 122-123, and therefore cannot apply the new version of MCL 333.7401(2)(a)(iii) to defendant. Defendant alternatively asks that we amend his judgment of sentence "to provide that he is eligible for parole in fifteen, not thirty, years." However, the issue of parole eligibility is within the province of the Department of Corrections, and the issue is not ripe for review in any event. We have no choice but to affirm defendant's sentences.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Bill Schuette